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IN THE

Supreme Court of the United States

October Term, 1970

No. 1176

TINO BARBIE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

TITO BARNES,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 30, 1970.

Opinion Below

A copy of the opinion of the United States Court of Appeals for the Second Circuit, entered on October 30, 1970 is annexed hereto as Appendix A.

Jurisdiction

A copy of the Judgment of the United States Court of Appeals for the Second Circuit, made on October 30, 1970, is annexed hereto as Appendix B.

Questions Presented

I—Whether the indictment against petitioner was obtained in violation of the Jury Selection and Service Act, as amended, and the new Jury Selection Plan approved by the United States Court of Appeals for the Second Circuit for the United States District Court, Southern District of New York

A. The new Jury Selection Plan became effective on December 22, 1968, pursuant to the Jury Selection and Service Act, as amended, March 27, 1968, Pub. Law 90-274, § 101,82, Stat. 54, 28 U.S.C. § 1861-1867.

B. The indictment against petitioner is based, in part, at least, upon proceedings conducted, and process issued, by a Grand Jury impaneled prior to, and serving prior to December 22, 1968, under the old Jury Selection Plan.

C. The Jury Selection and Service Act, as amended, contained no saving clause with respect to the work product of the Grand Jury impaneled and serving prior to the effective date of the new Plan.

II—Whether petitioner was prejudiced by statements and stipulations of co-defendants at trial without right of confrontation.

Constitutional Provisions and Statutes Involved

Sixth Amendment of the United States Constitution, the pertinent portion of which reads:

"In all criminal proceedings the accused shall enjoy the right * * * to be confronted by the witnesses against him * * *"

The pertinent portions of the Jury Selection and Service Act, as amended, March 27, 1968, Pub. Law 90-274, 28 U.S.C. § 1861-1867, as set forth in Appendix C at pages A-5 and A-6.

Statement of Matters Involved

Petitioner, Tipo Burnie, appealed to the United States Court of Appeals for the Second Circuit from a judgment of conviction entered on March 3, 1970, after trial before Hon. Marvin E. Frankel and a jury in the United States District Court for the Southern District of New York. Petitioner, who had no prior criminal record, was convicted of conspiracy to violate 18 U.S.C. §§ 1341 and 1342, of twenty substantive violations of 18 U.S.C. § 1341 and of one substantive violation of 18 U.S.C. § 1342.

A co-defendant, Cornelius Stoutchiller, was tried jointly with Burnie and was convicted on the conspiracy count and four substantive counts, namely, Counts 4, 7, 15 and 16 of the indictment which charge substantive violations of 18 U.S.C. § 1341. A co-defendant William Irving, was also tried jointly with Burnie and was convicted solely upon the conspiracy count, namely, Count 1.

Prior to trial, three co-defendants, namely, Vincent Turtora, John Krysinski and William Francis Johnson, pleaded guilty to various counts of the indictment and testified against the three defendants who stood trial.

Prior to trial, the Court granted a severance to the seventh named defendant, Andrew Lobet, who was never apprehended.

Indictment

The Indictment, filed on February 6, 1969, contains 22 counts. The first count charged the seven named defend-

ants, along with the five named co-conspirators, with conspiring to violate Title 18, §§ 1341 and 1342 of the United States Code during the period from January 1, 1967 to date of indictment, February 6, 1969. The conspiracy in substance is alleged to have been the agreement by defendants Petitioner, Irving Johnson, Kryminski, Lebet, Steenbakker and Tortora, together with co-conspirators Iglinis, Gambadoro, Greenberg, Krumholtz and Saitta (Par. 1) to devise a scheme to defraud Diner's Club, American Express and American Airlines (Par. 2) by causing credit cards to be stolen, by causing airline tickets to be purchased on the stolen credit cards, by causing such tickets to be delivered to petitioner at half price and used by petitioner to transport, by airplane, members of an entertainment group, managed by him, about the country and by causing Tin-Bar Amusement Corp. to reimburse petitioner the full price of such tickets (Par. 4). As part of the conspiracy, the mails and fictitious names were to be used (Par. 3). Thirty-one overt acts in furtherance of the conspiracy are alleged to have been committed (Par. 4), only one on the part of petitioner.

Substantive Counts 2 through 21 charged that petitioner and the other defendants participated in a scheme to defraud the credit card companies by means of false representations which caused the use of the mail on twenty different occasions in order to carry out the scheme, that is, under the alleged scheme, tickets were allegedly purchased on stolen credit cards by presenting them at airline ticket counters, whereupon the airlines billed the credit card companies by mail ten times, and the credit card companies paid them by mail on occasions. The last count, Count 22, alleges that in furtherance of the alleged scheme, defendants used, or caused to be used, fictitious names.

Steenbakker's Defense

Co-defendant Steenbakker contended that he had already pleaded guilty to an earlier conspiracy indictment,

68 Cr. 792, involving the same conspiracy at issue and that his prosecution was a violation of the double jeopardy provisions of the Constitution. Further, he stipulated he was in jail during a substantial period of the duration of the conspiracy, and argued that he could not have participated in same.

Irving's Defense

Counsel for co-defendant Irving made no defense other than the argument that Irving was a petty criminal who purchased airline tickets on stolen credit cards, but never became a part of the alleged conspiracy.

Reasons for Granting the Writ

The decision below should be reviewed because (1) it erroneously interprets the Jury Selection and Service Act, and (2) it deprives petitioner of his Constitutional rights of confrontation.

I.

The Indictment Was Obtained In Violation of the Jury Selection and Service Act and Jury Selection Plan of the United States District Court for the Southern District of New York.

The indictment was filed on February 6, 1969. It is, in part, at least, the work product of proceedings conducted, and of process issued, by a Grand Jury empaneled prior to December 22, 1968. As such, the indictment violates the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861-1867, and the Jury Selection Plan of the United States District Court for the Southern District of New York approved by the Court of Appeals for the Second Circuit, effective December 22, 1968.

The basis of petitioner's argument involves the following chronology:

3/27/68 — Jury Selection and Service Act of 1968, Pub. Law 90-274, 82 Stat. 54 enacted. Effective date 270 days after 3/27/68 except as to *cases in which indictment has been returned* or a petit jury empaneled prior to effective date. (Italics ours).

7/26/68 — The Judges of the United States District Court for the Southern District of New York adopted a Jury Selection Plan pursuant to aforesaid Act.

9/23/68 — The Reviewing Panel of the Court of Appeals for the Second Circuit approved said Plan and directed that the Plan, as amended, "become effective on and after the 22nd day of December, 1968 . . ."

12/16/68 (Monday) — The books and records of Tin Bar Amusement Corp. and certain personal records of Petitioner were seized by a Postal Inspector under subpoena duces tecum, dated December 16, 1968 issued by Grand Jury empaneled under Old Plan (Old Plan Grand Jury).

12/19/68 (Thursday) — Petitioner appeared before Old Plan Grand Jury pursuant to subpoena served on that date,—namely, 12/19/68. At conclusion of testimony, Petitioner was directed by Foreman to return on following day and to produce certain personal checks and bank statements.

12/20/68 (Friday) (Second Appearance) — Pursuant to direction of Foreman on prior day, Petitioner appeared and gave testimony to Old Plan Grand Jury and delivered personal records. At conclusion of testimony, Foreman directed Petitioner to appear before subsequent Grand Jury and to produce additional personal records.

12/22/68 — *New Jury Selection Plan became effective.*

1/21/69 (Tuesday) (Third Appearance) — Pursuant to direction of Foreman 12/20/68 of Old Plan Grand Jury, Petitioner appeared before New Plan Grand Jury, gave testimony and delivered personal records to Foreman. At conclusion of his testimony, Petitioner was directed to return on Thursday, January 23, 1969.

1/23/69 (Thursday) (Fourth Appearance) — Pursuant to instructions of Foreman on 1/23/69, Petitioner appeared before New Plan Grand Jury and gave testimony covering checks and bank statements seized by Postal Inspector on 12/16/68 and the personal records delivered to the Old Plan Grand Jury on December 20, 1968.

2/ 6/69 — Indictment of New Plan Grand Jury filed.

As appears from the above, the proceedings before the New Plan Grand Jury in January, 1969 were not commenced *de novo*, but were an extension of investigation started by the Old Plan Grand Jury prior to December 22, 1968.

It is the contention of the petitioner that the enactment of the Jury Selection and Service Act of 1968 made the subpoena of the Old Grand Jury invalid and while its work product could be used by the New Plan Grand Jury, it could only be used if that jury commenced its proceedings *de novo*.

Congress provided no saving clause with respect to the work product of a Grand Jury impaneled prior to December 22, 1968. It excepted only indictments actually *returned* by grand juries prior to such effective date, stating

> ". . . Provided That this Act shall not apply in any case *in which an indictment has been returned* prior to such effective date . . ." (italics ours)

The District Court denied petitioner's motion relying on the authority of *United States* v. *Bennett*, 409 Fed. 2d 888, 892-93 (2d Cir. 1969), Cert. Den. 396 U.S. 852 (1969), but that case was only concerned with the Jury Selection System when it operated unfairly, that is, in minimizing the participation by Black and Puerto Rican citizens and, generally, by the urban poor. It had nothing to do with the changes in the Jury Selection process mandated by Congress effective December 22, 1968.

The District Court upheld the validity of the use of the subpoena of the Old Plan Grand Jury relying on the case of *United States* v. *German*, 370 Fed. 2d 1019 (2d Cir. 1968, vac. on other grounds 389 U.S. 329 (1967)). This was error in that the subpoena power of the Old Plan Grand Jury expired on December 22, 1968.

The Court of Appeals upheld the District Court without discussion, also relying on the *Bennett* and *German* cases. It is the contention of petitioner that the enactment of the Jury Selection and Service Act of 1968, effective December 22, 1968 overruled by legislation both the *Bennett* and *Germans* decisions. This is an argument of first impression, there being no reported case on this point.

II.

The Petitioner was Deprived of his Constitutional Right of Confrontation.

Twice prior to trial, Petitioner moved for a severance of his trial on the grounds that

a) he had been joined prejudicially as a defendant with six convicted felons as co-defendants; and

b) the introduction of statements or confessions by his co-defendant without the right of confrontation would be prejudicial. Both of petitioner's motions were denied.

Thereafter, during trial, the following occurred and the motions for severance were renewed and motions for mistrial were also made.

A. Admissions and Arguments by Steenbakker's Counsel at Trial.

Throughout the trial, Steenbakker's counsel brought his defenses of (a) double jeopardy and of (b) incarceration during a substantial period of the duration of the conspiracy to the attention of the Jury.

1. In his opening statement, counsel for Steenbakker stated:

> ". . . As a matter of fact, Mr. Steenbakker, on a previous occasion, pleaded guilty to the crime of mail fraud . . ." (pg. 28); and that he had "been in jail since July, 1968".

2. Without prior warning, Steenbakker's counsel stipulated, before the Jury:

> "that Mr. Steenbakker was in federal custody from July 28, 1968 up to some time in late February, 1969".

3. Thereafter, counsel for Steenbakker stipulated that Steenbakker, in February, 1968, pleaded guilty to indictment 68 Cr. 792 (278).

4. On two occasions, Steenbakker interrupted trial before the Jury with shouts as to the manner of his arrest.

B. Admissions and Arguments by Irving's Counsel.

It was anticipated by Respondent that Irving would plead guilty prior to trial. By affidavit, verified January 9, 1970, the Assistant United States Attorney advised the Court as follows:

> ". . . 2. Of the seven defendants named in the indictment, the Government expects that prior to

trial the case against the following defendants will be disposed of by guilty pleas: Vincent Tortora, William Irving, John Krymiński and William Johnson. Andrew Lehet has been a fugitive since the date of the indictment.

". . . 3. In any event, the Government does not intend to use any statements, including Grand Jury testimony, as part of its direct case against any of the defendants who stand trial . . ."

1. Despite the above statement, Respondent read into the record excerpts of Irving's testimony before the Grand Jury.

2. Counsel for Irving in his summation conceded the criminal background of his client, and the criminal purchase of airline tickets but argued that "his client's conduct cannot rise to the level of being a conspirator in a federal conspiracy case.

By the time trial was concluded, the jury knew that all of petitioner's co-defendants were convicted felons, that three had pleaded guilty to the indictment at issue, that co-defendant Steenbakker had already pleaded guilty to the crime of mail fraud in an effort to establish a defense of double jeopardy, and that co-defendant Irving had admittedly purchased airline tickets illegally. Petitioner was inundated with felons, admissions of crimes and claims of double jeopardy—all without the opportunity of confrontation—in violation of petitioner's rights under the Sixth Amendment and contrary to the decision of this Court in *Bruton* v. *United States*, 391 U.S. 123 (1968).

It is apparent as to what tipped the jury's verdict against petitioner, but it is worth noting that at 6:05 P.M., after approximately six hours of deliberation, the Jury advised the Court that it did not feel that it would be able to come to a unanimous decision on petition. At 9:05 P.M., after having been instructed by the Court to retire and deliberate further, the guilty verdict was returned against petitioner.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD B. CONNOLLY
Attorney for Petitioner

JAMES LAWRENCE GARRITY
of Counsel

APPENDIX A

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 281-283—September Term, 1970.

(Argued October 16, 1970 Decided October 30, 1970.)

Docket Nos. 34656, 34695, 34760

UNITED STATES OF AMERICA,

Appellee,

v.

TINO BARZIE, WILLIAM IRVING and CORNELIUS STEENBAKKER,

Appellants.

Before:

CLARK, *Associate Justice,**

LUMBARD, *Chief Judge,* and KAUFMAN, *Circuit Judge.*

Appeal from jury convictions in the Southern District of New York, for violation of 18 U.S.C. §§ 371, 1341 and 1342, Frankel, *J.* Affirmed.

WALTER M. PHILLIPS, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and John W. Nields, Jr., on the brief), *for appellee.*

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* United States Supreme Court, retired, sitting by designation.

Appendix A

JAMES LAWRENCE GARRITY, New York, New York (Garrity, Connolly, Lewis & Grimes, and Edward B. Connolly, on the brief), for appellant Barzie.

THEODORE KRIMSEN, New York, New York, *for appellant Irving.*

JAMES E. EAGAN, New York, New York, for *appellant Steenbakker.*

PER CURIAM:

We affirm the convictions by a jury of Tino Barzie, William Irving and Cornelius Steenbakker in the Southern District, for conspiracy to commit mail fraud and 21 counts of mail fraud, in violation of 18 U.S.C. §§ 371, 1341 and 1342.

There is no substance to Steenbakker's claim of double jeopardy by reason of his plea of guilty to a different indictment charging a separate conspiracy, which conviction we affirmed in open court on August 12, 1970. His five-year sentence on the present conviction was imposed to run concurrently with a five-year sentence imposed by Judge Motley in the other case. So far as the indictments indicate, the conspiracies were separate and involved different people. The mere fact that Steenbakker and two other persons were charged with being members of both conspiracies and that both conspiracies involved dealing in stolen credit cards is far from establishing any claim of double jeopardy. Likewise the fact that the periods of time when the conspiracies were operating overlap to some extent is by itself no proof that Steenbakker was charged twice for the same offense. Steenbakker was afforded every opportunity by the trial judge to submit proof on this question, even after the jury verdict in this case. He failed to submit any proof, and it is abundantly clear that there is no merit to his claim.

The other contentions of the appellants have been examined; they do not merit discussion.

Affirmed.

APPENDIX B

(Judgment of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of October one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. TOM C. CLARK,
Associate Justice,
HON. IRVING R. KAUFMAN,
Circuit Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TINO BARZIE, a/k/a DANTE CAESAR BARBOTTINI, *et al.*,
Defendants,

TINO BARZIE, a/k/a DANTE CAESAR BARBOTTINI,
WILLIAM IRVING, CORNELIUS STEENBAKKER,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

APPENDIX C

(Pertinent Provisions of Statute Involved)

Judiciary—Procedure 28, § 1861, Note 5

Chapter 121.—Juries; Trial by Jury

§ 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.

1968 Amendment. Pub.L. 90-274 substituted provisions declaring the policy of the United States with respect to

trial by jury and the opportunity to serve on such juries for provisions setting out the required qualifications of Federal jurors, including age, citizenship, residence, freedom from conviction of certain crimes, ability to read, write, speak, and understand the English language, and capability of rendering efficient jury service.

Effective Date of 1968 Amendment. Section 104 of Pub.L. 90–274 provided that: "This Act [amending this section and sections 1821, 1862-1869, and 1871 of this title, repealing section 867 of Title 48, Territories nad Insular Possessions, and enacting provisions set out as notes under this section] shall become effective two hundred and seventy days after the date of enactment [Mar. 27, 1968]: *Provided* That this Act shall not apply in any case in which an indictment has been returned or petit jury empaneled prior to such effective date."

Short Title. Section 1 of Pub.L. 90–274 provided: "That this Act [amending this section and sections 1821, 1862-1869, and 1871 of this title, repealing section 867 of Title 48. Territories and Insular Possessions, and enacting material set out as notes under this section] may be cited as the 'Jury Selection and Service Act of 1968'."

Legislative History: For legislative history and purpose of Pub.L. 90–274, see 1968 U.S. Code Cong. and Adm. News, p. 1792.

JUDICIARY—PROCEDURE 28, § 1863

§ 1863. *Plan for random jury selection*

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and

that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall—

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and

twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

As amended Mar. 27, 1968, Pub. L. 90–274, § 101, 82 Stat. 54.

References in Text. The date of enactment of the Jury Selection and Service Act of 1968, referred to in subsec. (e), is the date of enactment of Pub. L. 90–274, which was approved on March 27, 1968.

1968 Amendment. Subsec. (a). Pub. L. 90–274 substituted provisions requiring a written plan covering the random selection of jurors by each United States District Court and the adoption, review and modification of the plan for provisions authorizing district judges to exclude or excuse for good cause persons called as jurors.

Subsec. (b). Pub. L. 90-274 substituted provisions setting out the nine required features of a plan for random jury selection, including management by commission or clerk, selection from voter registration lists, detailed procedures for selecting names, a master jury wheel, excused or exempted groups, maximum distances of travel, disclosure of names, and procedures for assigning jurors drawn from the jury wheel to particular grand and petit jury panels, for provisions authorizing the district court to excuse, for the public interest, classes or groups upon a finding that such jury service would entail undue hardship, extreme inconvenience, or serious obstruction or delay in the fair and impartial administration of justice.

Subsec. (c). Pub. L. 90–274 substituted provisions covering the transmittal of the plan to a reviewing panel and the modification thereof for provisions prohibiting the exclusion of any citizen from juror service on account of race or color.

Subsec. (d). Pub. L. 90–274 added subsec. (d).

Effective Date of 1968 Amendment. Amendment by Pub. L. 90–274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90–274, set out as a note under section 1861 of this title.

Legislative History: For legislative history and purpose of Pub. L. 90–274, see 1968 U.S. Code Cong. and Adm. News, p. 1792.